19526

The Supreme Court of the United States.

OCTOBER TERM, 1901.

Ex-parte the Nashua Savings Bank, Petitioner.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Petition for a writ of certiorari requiring the Circuit Court of Appeals for the First Circuit to certify to the Supreme Court, for its revision and determination, the writ of error taken by the Nashua Savings Bank, a corporation of the State of New Hampshire, against The Anglo-American Land Mortgage and Agency Company, Limited, a corporation of London, England.

1. Your petitioner is a corporation duly established by and under the laws of the State of New Hampshire, and a citizen of said state, and the defendant is a corporation under the laws of England, and an alien and citizen of England.

2. An action of assumpsit was brought by the said Anglo-American Land Mortgage and Agency Company, Limited, against your petitioner in the United States Circuit Court for the District of New Hampshire, on the 20th day of May, 1896.

3. The declaration in said action is as follows:

"In a plea of the case for that the said defendant heretofore, to wit, on the 2nd day of December, A. D., 1895, at said London, to wit, at Nashua in the state of New Hampshire in the United States of America, was further indebted to the said plaintiff in a large sum of money, to wit, eight thousand dollars for a certain call and assessment made by said company in pursuance of its charter and by-laws, at said London, to wit, on the 10th day of July, A. D., 1895,

and to be paid on the 3d day of December, A. D., 1895, upon the defendant's subscription to and ownership of a large number, to wit, one thousand shares at ten pounds sterling each, to wit, fifty dollars each of the capital stock of said company which subscription had theretofore been made and subscribed in due form by said defendant, to wit, at said Nashua, and of the said assessment and call the said defendant has notice at Nashua in the state of New Hampshire, heretofore to wit, on the 2d day of December, A. D. 1895, and thereafter, to wit, at said Nashua, on the 2d day of December, A. D. 1895, in consideration thereof, the defendant then and there promised the plaintiff to pay said sums on demand with interest at the rate of seven per cent per annum from the time the same became due and payable as aforesaid. Yet, though often requested, the defendant has never paid said several sums of money, or any of them, but has neglected and refused so to do."

4. And the plea is the general issue, with a brief statement of defense, of which the material allegations are as follows:

(1) It denies the said plaintiff corporation was ever duly organized, or that all the shares necessary to enable said corporation to duly and legally organize have ever been subscribed for or taken.

[Omitting numbers (2) to (6) inclusive as immaterial.]

(7) It says the plaintiff corporation has purposely and with a view to making unlawful assessments and calls, intentionally debarred the American stockholders from attending any meeting of said company, by neglecting to give the American subscribers to stock in said company, including the defendant, seasonable notice of the meetings of said company, at which said alleged assessments were voted, so that it would be possible for them to attend said meetings for want of such seasonable notice, and the defendant will claim that the assessments are invalid for this and other causes.

(8) It says the assessment declared upon was not a legal assessment against the stockholders in said company, because no notice to the stockholders was ever given of a meeting to consider the subject of making an assessment upon said stock, so as to render it possible for the stockholders to be present, or to be represented at such meeting.

(9) It says the assessments attempted to be collected in this suit are invalid, unlawful and unauthorized.

(10) It says that no assessment whatever was made, or is alleged to have been made, upon the stock alleged to have been sold, assigned, transferred and delivered to the defendant by said James Lewis Lombard, since said alleged sale, assignment, transference and delivery.

(11) It says that defendant never subscribed for any of the stock of said plaintiff corporation, nor was it at the time of said alleged assessment, nor has it ever been the owner of any such stock.

5. This action was brought to recover of your petitioner, as a stockholder in the Anglo-American Land Mortgage & Agency Company, unpaid assessments upon stock; and the case was heard before a jury, the Honorable William L. Putnam as circuit judge presiding, who at the close of the trial directed a verdict in behalf of the plaintiff and rendered a special opinion, which may be found at pages 41 to 52 of the copy of the record herewith filed; and who upon the facts and law so found ordered judgment against your petitioner. From this judgment a writ of error was taken to the United States Circuit Court of Appeals for the First Circuit.

6. The case having been heard before Judges Colt, circuit judge, and Aldrich and Brown, district judges, a majority opinion was delivered by Chief Justice Brown, sustaining the judgment of the Circuit Court, and a dissenting opinion was filed by Judge Aldrich, as appears of record.

7. The plaintiff, in order to prove the laws of Great Britain, read from the deposition of one Frederick H. Ramsden to the effect that he was a solicitor of the Supreme Court of Judicature of England, and familiar with the corporation laws of England under the Companies act of Great Britain, and he then produced printed portions of the Statute of Great Britain, as the laws of Great Britain. The petitioner objected to this mode of proof of the laws of a foreign country for reasons assigned in the record and set forth in the accompanying brief. The court admitted the evidence and petioner excepted.

8. The plaintiff introduced no evidence whatever that the plaintiff corporation was insolvent at the time of the making the calls or assessments sued upon, or at the time of the bringing of this suit, or that the call or assessment was made for the benefit of its

creditors or in payment of its debts. No promise, express or implied, to pay such assessment was proven other than that following the acceptance and retention of the certificate of stock by defendant and the articles of association and rules and regulations referred to in said certificate of stock, and the Statutes of Great Britain.

9. At the close of all the evidence in the case, and before the court charged the jury, the defendant moved that the court direct a verdict for the defendant on the pleadings and evidence in the case, for the reasons hereafter specifically stated:

Because (1) the declaration sets up an action in case, when it should have been in debt.

Because (2) the plaintiff is an alien corporation, and the declaration contains no averment or allegation as to the law of Great Britain, under which it is claimed said corporation was organized.

Because (3) the declaration contains no averment or allegation of any law of England or Great Britain authorizing the plaintiff to make the call or assessment sought to be recovered herein.

Because (4) the declaration contains no averment or allegation that said call or assessment was necessary to pay the debts of the plaintiff, or was made for the benefit of its creditors, and contains no averment or allegation upon what condition the plaintiff was authorized to make such calls or assessments and collect the same.

Because (5) the declaration contains no averment or allegation that any notice was ever given of such call or assessment to defendant.

Because (6) the declaration contains no averment or allegation that the defendant ever made any express promise to pay any such call or assessment.

Because (7) the declaration contains no direct averment or allegation that the payment of such call or assessment was ever demanded of defendant.

Because (8) the declaration contains no averment or allegation of the conditions or terms of the defendant's subscription to the stock of the plaintiff.

Because (9) the declaration contains no direct averment or alle-

gation that the defendant was a stockholder in said company at the time said call or assessment was made.

Because (10) there was no evidence in the case of an express promise on the part of the defendant to pay such call or assessment.

Because (11) there was no evidence in the case that this suit was instituted or carried on for the benefit of the creditors of the plaintiff or that this call or assessment was made for the payment of debts or other obligations of the plaintiff, and because the evidence tended to show that the plaintiff was not insolvent at the time of making the call or assessment or at the time of the institution of this suit.

Because (12) this action to recover calls and assessments cannot, in the absence of an express promise to pay on the part of the defendant, be maintained, unless to enforce the collection of the sum due thereon for the benefit of the creditors of the plaintiff corporation, or in payment of its debts.

Because (13) this remedy, under a statute of England and Great Britain, if enforceable at all, should be in debt. Upon each ground the court refused to direct a verdict for the defendant, to each of which refusals the defendant duly and seasonably excepted.

10. The respondent introduced in evidence, against your petioner's exception, a certified copy of the petitioner's account with the respondent, from the respondent company's book styled the Register of Members, but nothing further from that book was introduced, the circuit judge remarking that if the entire record was present he would not allow anything read except this.

To this introduction of extracts from said book the petitioner excepted for reasons, that the whole record was not introduced, and that it might appear that there was a registry of all the shareholders of the company appearing upon this book, and of their assessments and accounts.

11. The Circuit Court in its charge said that it was sufficient for the plaintiff that the corporation is a corporation de facto, and the retention by the defendant of its certificate of stock, produced at the trial upon request of the plaintiff, might operate as an estoppel to prevent your petitioner from denying that the plaintiff is,at

least, a corporation de facto. To this ruling the petitioner excepted.

12. The Circuit Court said in its charge that the proof of the statutes of Great Britain was made within the rule in that particular laid down by the Supreme Court of the state of New Hampshire in Hall vs. Costello, 48 N. H. 176, and that except for that decision it would be compelled to find that the statutes of Great Britain could not be proved in the way the plaintiffs have undertaken to prove them. To this ruling, that the proof of the statutes of Great Britain was within the rule laid down by the Supreme Court of New Hampshire, your petitioner excepted.

13. The court said: "The habitat of the plaintiff corporation is London, and the parties by their own free act have submitted themselves to the laws of Great Britain with reference to their mutual relations, and to all the acts of the corporation done at its domicile which are consistent with those laws. Therefore, I must be governed by the laws of Great Britain, so far as they are shown in the case; and, so far as they are not shown in the case, I must presume them to be the fundamental principles of the common law, with reference to which the federal courts are governed by their own rules, and do not accept the decisions of the local courts except so far as those decisions approve themselves to their judgment. In other words, to state the matter accurately, in so far as the laws of Great Britain are not proved, I am undoubtedly bound to assume that they are the same as the laws of New Hampshire, where this court is sitting; but, as to the laws of New Hampshire, with reference to a question of a general character we are not controlled by the decisions of the courts of New Hampshire except as they commend themselves to our own judgment."

To that part of this ruling, to the effect that the court is not controlled by the decisions of the courts of New Hampshire, except as they commend themselves to its judgment, your petitioner duly excepted.

14. The court ruled that the only remedy as held by the courts of Maine, New Hampshire and Massachusetts was by a forfeiture and sale of the stock; and a loss of what has been paid in upon it, by the defendant or its predecessors in title; but that that doctrine was contrary to the ordinary principles of law and that de-

fendant was liable pecuniarily for this call. To that part of the ruling of the court that the remedy for forfeiture and sale was not exclusive, your petitioner duly excepted.

15. The court ruled that the delivery to, and the receipt by, the petitioner of one thousand shares of the stock of the plaintiff corporation, such stock not being paid for and not being a gratuity, is like the delivery of any other property from one person to another, and by accepting delivery and retaining the property the petitioner impliedly promised to pay for it, at the times, and in the installments provided for in the articles of association. To this ruling of the court, that the receipt of the certificates of stock by the petitioner raised an implied promise to pay for it, the petitioners duly excepted.

16. The Circuit Court ruled that the action need not be in debt, but might be in indebitatus assumpsit. To this the petitioner duly excepted.

17. The court ruled that there was evidence of an agreement on the part of the petitioner, not a direct contract, but one arising from the relation of the parties, under the legislation of Great Britain, to pay this assessment existed. To this ruling the petitioner duly excepted.

18. The court ruled that this suit could be maintained on common law principles and independently of the statutes of Great Britain. To this ruling the petitioner duly excepted.

19. The petitioner objected to the instructions given by the Circuit Court as being against the pleadings and evidence for the reasons specifically stated:

Because (1) the declaration sets up an action in case when it should have been in debt.

Because (2) the plaintiff is an alien corporation and the declaration contains no averment or allegation as to the law of Great Britain and England under which it is claimed said corporation was organized.

Because (3) the declaration contains no averment or allegation of any law of England or Great Britain authorizing the plaintiff to make the call or assessment sought to be recovered herein.

Because (4) the declaration contains no averment or allegation that said call or assessment was necessary to pay the debts of the

plaintiff or was made for the benefit of its creditors, and contains no averment or allegation upon what condition the plaintiff was authorized to make such calls or assessments and collect the same.

Because (5) the declaration contains no averment or allegation that any notice was ever given of such call or assessment to defendant.

Because (6) the declaration contains no averment or allegation that the defendant ever made any express promise to pay any such call or assessment.

Because (7) the declaration contains no direct averment or allegation that the payment of such call or assessment was ever demanded of defendant.

Because (8) the declaration contains no averment or allegation of the conditions of defendant's subscription to the stock of said plaintiff.

Because (9) the declaration contains no direct averment or allegation that the defendant was a stockholder in said company at the time said call or assessment was made.

Because (10) there was no evidence in the case of an express promise on the part of the defendant to pay such call or assessment.

Because (11) there was no evidence in the case that this suit was instituted or carried on for the benefit of the creditors of the plaintiff, or that this call or assessment was made for the payment of debts or other obligations of the plaintiff, and because the evidence tended to show that the plaintiff was not insolvent at the time of making the calls or assessment, or at the time of the institution of this suit.

Because (12) this action to recover calls and assessments cannot, in the absence of an express promise to pay on the part of the defendant, be maintained, unless to enforce the collection of the sum due thereon for the benefit of the creditors of the plaintiff corporation or in payment of its debts.

Because (13) this remedy, under the Statute of Great Britain, if enforceable at all, should be in debt.

20. Your petitioner requested the court to instruct the jury that if any action can be maintained for the recovery of the sum due under the call and assessment sought to be enforced in this action by

the plaintiff, the lien thereon must be enforced by sale and forfeiture of these shares before this action can be maintained. The court refused to instruct the jury, as above requested; to which refusal, the defendant duly and seasonably excepted.

21. The case was heard in the Circuit Court before Judge Putnam, who ordered a verdict to be returned for the plaintiff, which was done, the damages being assessed at the sum of six thousand, eight hundred fifty-eight dollars and sixty-seven cents.

22. The Nashua Savings Bank duly appealed from the judgment of the Circuit Court to the Circuit Court of Appeals for the first circuit, and after hearing the said Circuit Court of Appeals affirmed the judgment of the Circuit Court; Aldrich, judge, dissenting.

A certified copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished as part of this application in conformity with rule 37 of this honorable court relative to cases from Circuit Court of Appeals, and the same is marked Exhibit "A."

Your petitioner is advised and believes that the said judgment of the said United States Circuit Court of Appeals in said case is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the act of congress entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes, approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said act.

Your petitioner recites the supposed errors of the Court of Appeals upon which it desires the review and consideration of this court as follows:

(1) The Circuit Court of Appeals erred in assuming that the proofs of the regularity of this call might have sufficiently appeared at the trial, so far as appears from the record. Whereas, your petitioner claims that the record shows for itself that it was substantially complete, and that nothing appears upon it, from which the Court of Appeal could justly assume that any such evidence of regularity existed, or that any evidence existed dehors the record,

and that it appears on the record that the respondent introduced the evidence which is subsequently recited in the record, and it nowhere appears that the respondent at any time introduced any other evidence, or that this recital of evidence is in any wise incomplete.

(2) A material question in the case being as to whether said assessment was regularly made for a lawful purpose, and there being no evidence for the purpose for which it was made, as appears of record, now the Circuit Court of Appeals erred in refusing to pass judgment upon the question whether or not it was to accord to the corporate proceedings of a foreign and alien corporation the same presumption of regularity that exists in respect to domestic corporations.

(3) The Circuit Court of Appeals erred in refusing to consider whether or not, upon the facts recited in the record, a promise to pay these assessments could be implied, there being no express promise, and no evidence as to what the law of England is in this behalf.

(4) The Circuit Court of Appeals erred in holding that there could be any recovery of these assessments, it not appearing that they were made for the benefit of creditors, or for payment of the debts of the plaintiff corporation. And it erred in holding that there might have been evidence that the call was regularly made, and for a proper purpose.

(5) The Circuit Court of Appeals erred in assuming that in the absence of testimony as to the purpose for which these calls were made, they might have been made for the benefit of its creditors, for payment of its debts, or because of the insolvency of the corporation.

(6) The Circuit Court of Appeals erred in holding upon all the evidence disclosed on the record, unaided by presumptions of regularity of corporate proceedings, the verdict was warranted, and in effect throwing upon your petitioner the burden of proving that the call was irregular and invalid.

(7) The Circuit Court of Appeals erred in holding the declaration in this case set forth sufficient allegations to enable a recovery under it.

(1) The action should have been in case, and not in debt.

(2) The declaration contains no averment or allegation as to the law of Great Britain, under which it is claimed the plaintiff was organized.

(3) It contains no averment or allegation of any law of Great Britain authorizing the plaintiff to make this assessment.

(4) It contains no allegation that said assessment was necessary to pay the debts of the plaintiff, or was made for the benefit of its creditors; and contains no averment upon what condition the plaintiff was authorized to make and collect such assessments.

(5) It contains no allegation that any notice of such call was ever given defendant.

(6) It contains no allegation that the defendant ever made any express promise to pay any such call or assessment.

(7) It contains no direct averment that the payment of such call was ever demanded of defendant.

(8) It contains no allegation of the conditions or terms of the plaintiff's subscription to the stock of the plaintiff.

(9) It contains no direct allegation that the defendant was a stockholder in the plaintiff company at the time said assessment was made.

(8) The Circuit Court of Appeals erred in not holding that in the absence of evidence as to the laws of Great Britain as to the mode of collecting assessments of this character, and in view of the laws of New Hampshire, the place where the case was tried, as to the mode of such collections, the laws of New Hampshire prevailed. It being the rule of law, as your petitioner understands, that the law of the place of contract prevails, but there being no evidence of the law of the place of contracting, the law of the forum should have prevailed. In the absence of proof of the laws of Great Britain upon this subject, the remedy should be according to the laws of New Hampshire,—by sale and forfeiture.

(9) The laws of England, as the petitioner claims, should have been proven (A) by exemplification under Great Seal.

(B) By certificate of an officer having authority to make it.

(C) By testimony from comparison with original enrollment.

(10) And your petitioner further says that it is apparent from the majority opinion of the Court of Appeals that said court, there

being evidence of the assessment of this stock, assumed that the same was regularly made, and for some lawful purpose. And your petitioner claims that such assumption in behalf of an alien corporation is without judicial precedent and erroneous. And that this question is new and of great importance, and involves in this and analogous suits large interests.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court directed to the United Stases Circuit Court of Appeals for the first circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled

Nashua Savings Bank Defendant, Plaintiff in Error

vs.

Anglo-American Land Mortgage and Agency Co. Limited, Plaintiff, Defendant in Error,

No. 303 on the docket of said court, to the end that the said case may be reviewed and determined by this court as provided in section 6 of the act of Congress, entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable court.

NASHUA SAVINGS BANK,
By THOMAS D. LUCE, *Assignee.*

UNITED STATES OF AMERICA.

State and District of New Hampshire.

HILLSBOROUGH ss.

NASHUA, Sept. 18, 1901.

Personally appeared before me, a notary public, within and for said County and State, the above named Nashua Savings Bank by Thomas D. Luce, Assignee, and made oath that the allegations of the foregoing petition by it subscribed are true, to the best of its knowledge, information and belief.

WITNESS my hand and notarial seal at said Nashua, the day and year above written.

[Seal] Fred D. Crosa *Notary Public.*

I, John S. H. Frink, having been duly admitted to practice in the Supreme Court of the United States, as an attorney and counsellor of the Court, do hereby certify that the foregoing petition for a writ of certiorari has been examined by me, and that in my opinion, for the reasons therein set forth, the writ ought to issue as prayed for.

JOHN S. H. FRINK.

PORTSMOUTH, NEW HAMPSHIRE,
Sept. 19, 1901.

The Supreme Court of the United States.

OCTOBER TERM, 1901.

NASHUA SAVINGS BANK, *Petitioner,* v. ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, LIMITED, *Respondent.*	IN PETITION FOR CERTIORARI

Brief in support of petition for Certiorari by NASHUA SAVINGS BANK, Petitioner,

J. S. H. FRINK, Counsel for Petitioner.

This is an action of of assumpsit brought to recover an unpaid assessment or call made by the ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, LIMITED, against the NASHUA SAVINGS BANK, a stockholder.

The petitioner is a New Hampshire Corporation. The respondent is an alien Corporation, organized under the Companies act of England.

The case was tried before Hon. William L. Putnam, Circuit Judge for the First Circuit with a jury. The Circuit Judge directed the jury to return a verdict for the original plaintiff, the Anglo-American Land Mortgage and Agency Company, and on the 30th day of June 1898, the jury returned such verdict assessing damages in the sum of six thousand, eight hundred and fifty-eight dollars and sixty-seven cents.

On the 29th day of October, 1898, a bill of exceptions was allowed, and upon error, those exceptions were heard by the Circuit Court of Appeals, and on the 24th day of April, 1901, by a majority opinion the judgment of the Circuit Court was approved by Judges Colt and Brown, Judge Aldrich dissenting.

The declaration and pleadings appear upon the 3d–9th pages of the Record inclusive, but the trial proceeded under the third count in the declaration on page 6 of the Record.

The evidence introduced by the original plaintiff, (respondent in petition,) consisted of the deposition of Frederick H. Ramsden, an English solicitor, portions of certain statutes of Great Britain, claimed to have been authenticated by Mr. Ramsden's deposition, also a memorandum of the association of said company, a certificate of incorporation, articles of association of the respondent company, certificate of stock issued to the petitioner, and endorsement of payment on account of said shares on the back of the certificate, and notice of the call to the petitioner.

See Bill of Exceptions, pages 13 to 28 of Record inclusive.

The defendant (your petitioner) read in evidence certain of the articles of association appearing on pages 29 and 30 of the Record, but introduced no further testimony.

The defendant moved the Circuit Court, after all the evidence in the case was in, to direct a verdict for the defendant and assigned as cause therefor the reasons given on pages 30 and 31 of the Record.

The court then charged the jury as found in the Record and directed a verdict for the original plaintiff (the respondent.)

The case fairly raises the important question whether upon the evidence, appearing of record, the Circuit Court should not have directed a verdict for your petitioner, (the defendant below,) and not for the respondent (the plaintiff below.)

The majority opinion of the justices of the Court of Appeals proceeds upon the proposition that the Record does not purport to contain all the evidence, and therefore they decline to consider the question.

Page 72 of Record.

The minority opinion meets the issue squarely, and Judge Aldrich discusses the question with great fairness and intelligence.

The majority of the court erred in the assumption that the Record does not contain all the material evidence in the case, indeed substantially all the evidence material or immaterial in the case.

On page 13 of this Record is found this recital:

"At the trial before the jury begun on the 27th day of June, A. D. 1898, the plaintiff introduced the following evidence."

No words of exclusion or limitation are used, and the fair construction of the words is, that the subsequent pages of the printed record contain all the evidence introduced by the plaintiff. There is nothing in the Record negativing or controlling this conclusion.

We submit confidently that it appears that all the evidence in the case was before the Circuit Court, and that the court should have acted upon that hypothesis.

It is true that all of the deposition of Mr. Ramsden does not appear in the case, but there is no evidence and no presumption that it was all read by the plaintiff below. Certain portions of it may have been omitted. We refer the court to the remark or ruling of Judge Putnam (page 28, Record) and the statement at bottom of page 26 of Record.

There was no evidence whatever of any compliance with any conditions precedent, or that other subscribers to the capital stock had paid their subscriptions, or had been assessed equally with this petitioner.

It appearing, as we maintain, that all the evidence was before the Court of Appeals and that the majority of the court found it convenient on the plea of an imperfect record to avoid determining the question as to whether there was sufficient evidence to justify the verdict, we ask this court to review their decision.

I.

Our first proposition then is that the majority of the justices of the Court of Appeals erred in refusing to consider the question as to whether the Circuit Court should or should not have directed a verdict for your petitioner, upon the ground of insufficiency of evidence.

Upon this question we submit that the petitioner is entitled to the judgment of some court; and as it did not obtain that of the Court of Appeals, it is entitled to that of this tribunal—unless our

claim, that the evidence in the court below was too meagre to support a verdict, is too frivolous to demand serious consideration.

II.

Our second proposition is that the evidence of record cannot support the verdict, unless aided by the presumption that the proceedings in the organization of this foreign company and in laying the assessment were regular, legal, and for a lawful purpose.

Conceding for the purpose of this argument that the Statutes of Great Britain were properly proven by Mr. Amsden and the regularity of the organization of the respondent company, yet there is an absolute want of any testimony as to whether there was any lawful occasion for any call as to the purpose for which the money was to be raised, whether for a lawful or unlawful purpose, whether the company was solvent or insolvent, whether it was needed to pay debts, or expenses, or whether it was intended for gratuitous distribution, &c., &c.

Now, if it is a presumption of law that all these proceedings and purposes were lawful in the case of a foreign company, as perhaps it is in the case of a domestic corporation, our objection may not be well taken, but that is one question upon which we want the opinion of the court.

This seems to us a question of importance. We do not find that it has ever been fully considered and determined by this court. It may have been, but we have not discovered the case.

This question is of great importance when we consider the numberless international corporate enterprises in which American citizens are now interested.

In Am. Pastoral Co. vs. Gurney, 61 Fed. Rep. 41, it was held that the validity of calls made by a British Corporation for unpaid stock is to be determined by the British laws.

This must of course be so, if the British law is duly proven, but British law is a question of fact, and was not shown in the case at bar.

It may be said, none the more were they proven in the case last cited; that the Articles of Association in this case as in that, gave the directors authority to issue calls for unpaid subscriptions. No question appears to have been raised in that case as to the purposes

for which the calls were made, nor as to whether there was any presumption in favor of their legality. We ask a determination of this question.

The evidence in the case at bar, as has been said in the dissenting opinion, consisted entirely of some (we say irregular) proof of the English Statutes, the Articles of Association and the call and notice of it. The necessity of proof that the call was uniform (see pages 30 and 31 Record) or that the proceedings were regular, or that it was made for a lawful purpose, that it was not made for some purpose unlawful or "ultra vires," was denied by the Circuit Court.

If any of these facts had appeared, of course there could have been no recovery. It is the presumption that all the proceedings were regular and lawful that enables the recovery of such calls in the case of a domestic corporation. The case presents the question whether such presumption obtains in the case of an alien corporation.

Many reasons occur from analogy as well as reason, why the case of an alien corporation is distinguishable from that of a domestic one.

(1) The proof of the regularity or necessity of the call is entirely in the hands of the company itself, while it is almost inaccessible to the stockholder of another country.

(2) Foreign laws are to be proven and established as facts, domestic ones are within judicial knowledge.

(3) Foreign judgments are as a general proposition impeachable. They are not entitled to the same effect as judgments of domestic courts (independent of Art. 4 of the Constitution.)

Hanley vs. Donoghue, 116 U. S. 4.
Wisconsin vs. Insurance Co., 127 U. S. 292.
Christmas vs. Russell, 5 Wall 304.

By parity of reasoning we think the effect to be given to the acts of a foreign corporation cannot carry the same conclusive presumption of regularity in the absence of any evidence to that effect, as in the case of domestic corporations.

When a court takes judicial notice of the laws under which certain acts are done, it is a natural conclusion that these acts are well done, or the court would discover it; but when a court will take no cognizance of the laws without proof, then it seems an ex-

treme conclusion to assume that the acts done under them are regular, without at least proof of the effect given these acts in the jurisdiction where they are done.

Perhaps the distinction between the recognition given by the courts to a domestic and foreign corporation furnishes a closer illustration of the presumption to be accorded its acts than almost any other example.

It seems to be the well accepted rule of law that a domestic corporation is assumed to be duly created,

Angell & Ames on Corporations, 7th Ed. Sec. 632.
Savage vs. Russell, 84 Ala. 103.
Webster vs. Upton, Assignee, 91 U. S. 65.
Chubb vs. Upton, 95 U. S. 665.
Telegraph Co. vs. Purdy, 162 U. S. 329, 336.
Haile vs. Hardon, 95 Fed. Rep. pp. 752 and 757,

While in the case of a foreign corporation not only must it be proved, but also there must be proof of the laws authorizing its creation.

Thompson's Commentaries of the Law of Corporations, Sec. 7712.

The distinction raised we regard as important.

III.

We further desire this court to review the decision of the Court of Appeals, sustaining the opinion of the Circuit Court, that at the trial below the Statutes of Great Britain were proved according to the established rules of law.

The materality of the proof of these Statutes is conceded.

It is elementary law that the Statutes of Great Britain are facts, of which this court does not take cognizance without proof.

Liverpool G. W. Steam Co. vs. Insurance Co., 129 U. S. 445.

ORDINARY MODES OF PROOF.

(1) By exemplification under Great Seal.
(2) By certificate of an officer having authority to make it.
(3) By testimony from comparison with original enrollment.

Church vs. Wheaton, 2 Cranch 238.
Emery vs. Berry, 28 N. H. 485.

DISTINCTION BETWEEN PROOF OF WRITTEN AND UNWRITTEN LAW, RECOGNIZED IN EMERY VS. BERRY.

The Circuit Court recognized the modes of proof, as above suggested, as the appropriate ones and the distinction between the modes of proving written and unwritten foreign laws, but held that the strict rule had been relaxed in New Hampshire in

Hall vs. Costello, 48 N. H. 176.

It is true the mode of proving the laws of Canada in that case was not in strict conformity to the formal rules, adopted in Emery vs. Berry, but it was not relaxed sufficiently to admit the Statutes of Great Britain as proven here.

DISTINCTION BETWEEN MODE OF PROOF ADOPTED IN HALL VS. COSTELLO AND IN CASE AT BAR.

The syllabus covers what was done in Hall vs. Costello. It is in these words:

"In proof of the laws of a foreign country, the testimony of any person, whether a professional lawyer or not, who appears to be well informed upon the subject is competent."

In conformity to this rule, two New Hampshire lawyers having had occasion to learn from their practice what the law of Canada was, stated it, gave their sources of information, and fortified themselves by reference to the printed laws.

It was not an attempt to prove the Statutes of Great Britain by a copy of them, but their import by the mouth of witnesses.

In the case at bar, no such course was pursued.

It became necessary for the (original) plaintiff to prove under the plea and brief statement,

See Record, page 7,

not only that the company was duly organized under the laws of Great Britain, but that under the laws of Great Britain it had a cause of action, and to lay the foundation of the proof of these laws they produce a Mr. Ramsden.

See Record, page 16.

Now if they had asked Mr. Ramsden what the laws of Great Britain were, and allowed him to have refreshed his recollection by reference to the printed Statutes, they would have brought themselves within the rule in Hall vs. Costello.

He didn't undertake at all, of his own knowledge, to give the laws of Great Britain written or unwritten.

He says the plaintiff was a company formed under certain acts. He doesn't as an expert even say they had in all respects complied with the requirements of those acts. He then, without any authentication, produces what he says are copies of the acts printed by Her Majesty's printer, with the remark that they are by law receivable in evidence without further proof. I suppose by that latter remark he doesn't mean to testify as an expert to this court that they are receivable in evidence here without further proof.

That last remark is a solution of his whole testimony. He doesn't intend as an expert to enlighten this court as to what the law of Great Britain is from his own testimony, but simply to produce certain printed or written transcripts, which he says prove themselves.

This would be true in Great Britain and its dependencies, but not in a foreign country.

We adopt the idea, if not the language, of the Lord Chancellor in Sussex Peerage case, 11 Clark & F., 85, when he says the witness may refresh his recollection by reference to the written law, but the proof of the law is to be from the witness, not the book.

The witness' testimony has not added a word to the copies of the Statute. If it is enough to present a portion of the enactment of a foreign country, purporting to be printed by authorities without any verification, then these Statutes have been proven, otherwise not.

Beach vs. Workman, 20 N. H. p. 383.

The general rule as to the proof of foreign laws is that the law which is written, that is Statute law, must be proved by a copy properly authenticated; and that the unwritten law must be proved by the testimony of experts; that is, by those acquainted with the law.

Ennis vs. Smith, 14 How, 400.
Pierce vs. Indseth, 106 U. S. 551.

It would seem, in the case last cited, the state Statute per-

mitted proof very similar to that attempted by plaintiff, but it would have been inadmissible but for such Statute. We repeat, no law of New Hampshire justifies it.

Supposing in a trial in New Hampshire a lawyer of Massachusetts was called to prove the corporation law of their commonwealth, and did it by presenting certain detached printed chapters of the Statutes of that state, to the court or jury, without further comment than that they were printed by authority and receivable on evidence there without proof, is there any known rule of law which would justify such proof?

IV.

On the fifty-eighth page of the Record will be found this assignment of error:

"The Circuit Court erred in denying the motion of the defendant to direct a verdict for the defendant on the pleadings and evidence in the case."

Subdivisions (2,) (3.) (4,) (6) and (8.)

See also paragraphs (19,) (20,) (21,) (23,) (25,) in assignment of errors, pages 65 and 66 of Record.

The exceptions, to which we now call the attention of the court, relate to the defective or insufficient statement of the plaintiff's case in the declaration.

The declaration is as follows:

"In a plea of the case for that the said defendant heretofore, to wit, on the second day of December, A. D. 1895, at said London, to wit, at Nashua, in the state of New Hampshire, in the United States of America, was further indebted to the said plaintiff in a large sum of money, to wit, eight thousand dollars for a certain call and assessment made by said company in pursuance of its charter and by-laws, at said London, to wit, on the tenth day of July, A. D. 1895, and to be paid on the third day of December, A. D. 1895, upon the defendant's subscription to and ownership of a large number, to wit, one thousand shares at ten pounds sterling each, to wit, fifty dollars each of the capital stock of said company, which subscription had theretofore been made and subscribed in due form by said defendant, to wit, at said Nashua, and of the said assessment and call the said defendant had notice at Nashua, in the state of New Hampshire,

heretofore, to wit, of the second day of December, A. D. 1895, and thereafter, to wit, at said Nashua, on the second day of December, A. D. 1895, in consideration thereof, the defendant then and there promised the plaintiff to pay said sums on demand with interest at the rate of seven per cent per annum from the time the same became due and payable as aforesaid. Yet, though often requested, the defendant has never paid said several sums of money, or any of them, but has neglected and refused so to do."

Page 13 of Record.

It is not enlarged or aided by any former counts, as they are all eliminated.

This action is founded, in part, upon the Statutes of a foreign country.

The court is presumed to be in absolute ignorance of the laws of Great Britain.

This action is admittedly founded on these laws. How is the court to know, from an inspection of the writ, that these laws give the plaintiff any cause of action?

The court says in Liverpool Steam Company vs. Insurance Company, 129 U. S. R., p. 445:

"The law of Great Britain since the declaration of independence is the law of a foreign country, and like any other foreign law is a matter of fact which the courts of this country cannot be presumed to be acquainted with or to have judicial knowledge of unless it is pleaded and proved."

"The rule that the courts of one country cannot take cognizance of the laws of another without plea and proof has constantly been maintained at law and in equity in England and America." See

Bank of North America vs. Rindge, 154 Mass. 204.
Hancock National Bank vs. Ellis, 166 Mass. 414.

V.

We call the attention to another supposed error of the Court of Appeals in holding that this action could be maintained in the New Hampshire District without evidence of an express promise.

There is no pretence that there was an express promise.

Our contention may be thus succinctly stated.

(1) That plaintiff offered no evidence as to what the law of Great Britain is in regard to the collection of calls or assessments in the absence of an express promise to pay, and without evidence of the necessity of such calls or assessments in order to pay debts, when the articles of association provide for a forfeiture of stock.

(2) There being no evidence as to the law of Great Britain, the court must assume that the law of Great Britain in this behalf is the same as that of New Hampshire.

(3) The law of New Hampshire declares that no such action can be maintained.

The law of England bears the same relation to the courts of the United States that the laws of one of the United States do to the courts of another state of the Union, and we only suggest this because we desire to make an extract from a state case showing the rule, as to the burden, of proving foreign laws, and the presumptions in the absence of such proof.

"Where the question of the law of another state (foreign country) is in controversy, the party upon whom the burden rests will fail, unless evidence is produced to sustain his view; and Statutes and Decisions that were not put in evidence at the trial cannot be used the first time at the argument of the case before the court for the purpose of proving the law of such state (foreign country.)"

'In the absence of anything to show the contrary, there is a presumption that the common law of another state (foreign country) is like that prevailing here."

Kelley vs. Kelley, 161 *Mass. R.* 111.

"Contracts made in a foreign country, in the absence of evidence of what their legal effect would be in the place in which they were executed, receive the same construction and have the same effect as if they were executed in the place where the action to enforce them is brought."

Whidden vs. Seelye, 4 Maine 247,

and many other cases.

Whether an action of assumpsit or debt would lie in Great Britain to enforce this assessment or call, or whether there must be proof of its necessity or whether remedy must be had by forfeiture and sale in the first instance, or exclusively, the plaintiff has offered

no evidence; Great Britain being an alien country, the burden was on plaintiff to prove its laws.

Liverpool G. W. Steam Co. vs. Insurance Co., 129 *U. S.* 445.
Pierce vs. Indseth, 106 *U. S.* 551.

What is the law of New Hampshire in this behalf?

The cases declaring the law of New Hampshire are long continued and uniform.

The rule is thus stated by Judge Woodbury, for many years a justice of the Supreme Court of the United States, as a principle of common law:

"It is well settled that when an act of incorporation gives no express remedy against a member for assessments he is liable to no action for them by virtue of his membership."

"The corporation can enforce payment only by a sale of his shares, and if action can be sustained against him it must be founded on a distinct private promise to pay the sums assessed."

Franklin Glass Co. vs. Alexander, 2 *N. H.* 381.

This case has been affirmed or approved in

Railroad vs. Johnson, 30 *N. H.* 390.
Company vs. Burlingame, 67 *N. H.* 301.
Shattuck vs. Robbins, 68 *N. H.* 565.

Such, too, is the law of Massachusetts and Maine.

But it is said that this court is not bound to follow the decisions of New Hampshire, the question involving principles of general law. No reason appears why this court should not follow the law as administered in New Hampshire, and there are potent reasons why it should.

In the first place it is hardly a question of general jurisprudence. It is rather local than otherwise, and not one arising from or concerning the usages of commerce. None of the reasons, urged in Railroad Co. vs. Bank, 102 U. S. 58, for a uniformity of decisions in transactions of a commercial character apply here.

But there are no Federal decisions contravening the New Hampshire cases, and if none the Federal courts will lean, even in matters of general jurisprudence, towards the views of the state courts.

Burgess vs. Seligiman, 107 *U. S.* 34.

The case of Upton vs. Tribilcock, 91 U. S. 47 was an action by an assignee, and seems to have been decided on the ground that the unpaid subscription was a trust fund for the payment of corporate debts.

Webster vs. Upton, 91 U. S. 65, is simply an affirmation of the rule of law, that an assignee in bankruptcy can maintain an action for the unpaid balance due on stock subscription without an express promise.

In these cases no remedy was provided by forfeiture and sale of the shares as in the case at bar.

The case of Chubb vs. Upton, 95 U. S. 668, is based entirely upon the last two cases referred to.

These cases differ from the one under consideration in that they were suits brought by an assignee in bankruptcy to recover monies to pay the creditors of the corporation, and it does not appear that the charters or articles of association contained any provision for forfeiture and sale of the shares.

But independent of these distinctions, if it appeared affirmatively that the law of Great Britain was that there must first be a sale and forfeiture of the shares, and a suit would not lie without an express promise, then these decisions would be read as part of the contract.

As the law of Great Britain must be assumed to be the same as that of New Hampshire, then the law of New Hampshire constitutes part of the contract, upon the ground that it is the law of the place of the contract.

As said by the court in Hoadley vs. Transportation Co., 115 Mass. 307, it is sometimes difficult to determine whether the rule sought to be applied touches the contract or the remedy. We find some difficulty in determining the question in this case. It would seem to touch the mode of enforcing a liability. If so, it is in remedy, and the rule of the New Hampshire court in that event must govern.

The question had been raised whether or not the words:

"All moneys payable by any member of the company, in pursuance of the conditions or regulations of the company or any such

conditions or regulations shall be deemed to be a debt due from such member to the company" do not amount to an express promise.

Paragraph 16, page 18 of Record.

It is difficult to extract from these words any express promise to pay. They indicate simply the character of the obligation incurred by a call or assessment, and do not touch the manner of its enforcement. Very likely the call or assessment, independent of this provision, would be a debt, but it does not follow from that that the subscriber to stock promised to pay it in money, regardless of whether the money was necessary to the discharge of the duties and obligations of the company; nor does it follow that it agreed so waive its collection by a forfeiture and sale and promised to pay it in money.

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